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LIMITATIONS ON AIR CARRIER LIABILITY: AN INADVERTENT RETURN TO COMMON LAW PRINCIPLES

EUGENE WESLEY ALBERT

I. INTRODUCTION

WITH THE PASSAGE of the Airline Deregulation Act¹ and the Air Cargo Deregulation Act,² Congress dismantled an extensive regulatory structure that had governed the rights and liabilities of shippers, passengers and air carriers since 1938.³ Much of this regulation has been accomplished through the use of tariffs,⁴ which set out the rates and practices of air carriers, including limitations on liability.⁵ These tariffs have been filed with the Civil Aeronautics Board (Board) and once approved by the Board as reasonable, have been upheld by the courts even if the tariffs were inconsistent with common law rules. The deregulation acts have mandated a return to common law principles after almost fifty years of regulatory control.

This comment will examine this return to common law principles, looking at the soon to be abolished regulatory structure, the deregulation acts, and the common law gov-

¹ Airline Deregulation Act of 1978, Pub. L. No. 95-504 § 102, 92 Stat. 1705-54 (1978).

² Air Cargo Deregulation Act of 1977, Pub. L. No. 95-163, 91 Stat. 1278-89 (1977).

³ See 49 U.S.C. §§ 1301-1552 (1976 & Supp. IV 1980).

⁴ A tariff is a public document setting forth the services of a carrier being offered, the rates and charges with respect to those services and the governing rules, and regulations and practices relating to those services. *International Tel. & Tel. v. United Tel. Co. of Fla.*, 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975).

⁵ See *infra* notes 20-26 and accompanying text.

erning domestic⁶ common carriers.⁷ Most common carriers have been subject to regulation for some time, therefore the ultimate result of the deregulation of liability limitations has yet to be determined. At best the law in this area is uncertain and perhaps courts today may not approach liability limitations in the same manner they did fifty years ago when judicial attitudes towards liability limitations and contracts of adhesion were more tolerant.

II. THE REGULATORY SCHEME

A. *Early Air Travel*

In the early days of air travel, the common law of common carriers governed an air carrier's attempt to limit its tort and contract liability.⁸ As a common carrier, the early airlines owed passengers and shippers a very high standard of care.⁹ Many commentators feared that without some limitation on liability, potential tort damages would cripple the young, struggling industry.¹⁰ It was thought that some share of the

⁶ The Warsaw Convention, officially known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention] controls the liability of air carriers in international transit.

⁷ A common carrier holds itself out to the public as willing to carry all passengers for hire indiscriminately. Such "holding out" may be established by advertising. *McClusker v. Curtiss-Wright Flying Serv., Inc.*, 269 Ill. App. 502 (1933), *reprinted in* [1933] U.S. Av. R. 105. Private carriers do not owe passengers and shippers the same high standard of care that common carriers do. *Sleezer v. Lang*, 170 Neb. 239, 102 N.W.2d 435 (1960).

⁸ See, e.g., *Curtiss-Wright Flying Serv., Inc. v. Glose*, 66 F.2d 710 (3d Cir. 1933), *cert. denied*, 290 U. S. 696 (1934); *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1935).

⁹ *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1935).

¹⁰ See, e.g., W. DAVIS, *AERONAUTICAL LAW* 313-24 (1930) ("There seems to be a tendency on the part of the public and the courts to apply very strict rules of liability towards air transport . . . [Instead, the law should] aid this form of transportation which will in the future play such a large part in the development of the country"); McDermott, *Common Carrier Liability Applied to Carriers by Air*, 23 A.B.A. J. 703, 705 (1937) ("there is a possibility that this new method of transportation, which has proved itself a very useful and important one and which in many respects has no substitute, may be throttled by too strict a liability"); Rittenberg, *Limitation of Airline Passenger Liability*, 6 J. AIR L. 365 (1935) ("One of the greatest obstacles to [the end of a firm financial foundation for air carriers] is contingent tort liability").

risk resulting from the inherent dangers and incomplete development of air transportation should be carried temporarily by the shipper and passenger as a concession to this new form of travel in order to guarantee the continued existence of the air transportation industry.¹¹

In addition, early commercial air carriers experienced difficulty obtaining liability insurance because insurers were reluctant to take a risk on an industry whose losses could not be predicted adequately.¹² Some commentators viewed limitations on liability as a vehicle to encourage insurers to aid carriers entering the field.¹³ Air carriers could then offer reasonable rates and still be guaranteed a reasonable return.

Aside from considerations of potential liability, many did not consider competition to be particularly beneficial to the airline industry or the public. Indeed, it was generally thought that the troubled business conditions of the air carrier industry during the 1930's were caused in part by the destructive competition of too many air carriers.¹⁴ The established air carriers feared that without regulation, unsubsidized air carriers using inferior equipment and paying lower wages would lure business away from the established carriers to the detriment of the public at large.¹⁵

B. Regulation

With the above considerations in mind, Congress enacted the Civil Aeronautics Act of 1938,¹⁶ which was essentially re-enacted in the Federal Aviation Act of 1958 (Act).¹⁷ These

¹¹ McDermott, *supra* note at 10, at 704. See also *Law v. Transcontinental Air Transp., Inc.*, [1931] U.S. Av. R. 205 (E.D. Pa.); *Herndon v. Gregory*, 190 Ark. 702, 81 S.W.2d 849 (1935).

¹² See Rhyne, *Liability Problems of Air Cargo Carriage*, 15 LAW & CONTEMP. PROBS. 69 (1950); Rittenberg, *supra* note 10, at 391.

¹³ *Id.*

¹⁴ See generally Kelleher, *Deregulation and the Practicing Attorney*, 44 J. AIR L. & COM. 261, 263 (1978).

¹⁵ Kelleher, *supra* note 14, at 263-64.

¹⁶ Pub. L. No. 706, 52 Stat. 973 (current version at 49 U.S.C. §§ 1301-1552 (1976 & Supp. IV 1980)).

¹⁷ Pub. L. No. 85-726, 72 Stat. 737 (current version at 49 U.S.C. §§ 1301-1552 (1976 & Supp. IV 1980)). The Federal Aviation Act transferred safety functions from the Civil Aeronautic Board to a new Federal Aviation Administration.

acts established the Civil Aeronautics Board, granting it broad powers to govern the economic conditions of the commercial air industry.¹⁸ No person could engage in air transportation without first obtaining a certificate of public convenience and necessity from the Board.¹⁹ Air carriers were required to file detailed tariffs with the Board, which set out the carriers' rates, rules, practices and services.²⁰ Departure from the established tariffs constituted a criminal offense.²¹ Congress also gave the Board power to prohibit any existing or proposed rates, rules or practices that it found unjust or unreasonable.²² The Board could also temporarily suspend existing rates or practices that it believed to be objectionable pending an investigation.²³ The Board promulgated numerous economic regulations under the Federal Aviation Act, ruling on the reasonableness of airline tariffs.²⁴ Although the Act did not expressly require that limitations on liability be included in tariffs,²⁵ the Board interpreted its statutory power to govern rates as encompassing the "terms, conditions and other provisions which affect rates," which included limitations on liability.²⁶

C. *The Effect of Tariffs*

Once a tariff was properly filed and accepted by the Board, it constituted the contract of carriage between the airline and its shippers and passengers, and conclusively governed the rights and liabilities of the parties.²⁷ A tariff operated to limit the air carrier's liability even if the shipper or passenger had

¹⁸ 49 U.S.C. § 1324 (1976)(amended 1978).

¹⁹ *Id.* § 1371(a).

²⁰ *Id.* § 1373.

²¹ *Id.* § 1482.

²² *Id.*

²³ *Id.* § 1482(g).

²⁴ See 14 C.F.R. § 221 (1982).

²⁵ See 49 U.S.C. § 1373 (1976)(amended 1978).

²⁶ 14 C.F.R. § 221.38(a)(2) (1982).

²⁷ *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951); *Mao v. Eastern Airlines, Inc.*, 310 F. Supp. 844 (S.D.N.Y. 1970). For a general discussion of the effect of tariffs on air carrier liability, see Pratt, *Tariff Limitations on Air Carriage Contracts*, 25 J. AIR L. & COM. 1 (1963) and Rhyne, *supra* note 12.

no actual knowledge of the tariff's contents,²⁸ although the carrier's contract of carriage typically incorporated the tariff by reference. Courts sometimes gave tariffs an even greater effect and interpreted the tariffs as law, because the tariffs were required by law to be filed.²⁹ The tariff system resulted in most courts applying tariffs instead of conflicting common law principles, even though the Act specifically disavowed limiting any common law remedies.³⁰

Most courts followed the doctrine of primary jurisdiction to refuse to question the reasonableness of tariffs approved by the Board. The doctrine of primary jurisdiction requires that provisions of a tariff properly filed with an administrative body and within its authority be deemed valid until rejected by that body.³¹ This doctrine was first adopted with respect to the Board in *Lichten v. Eastern Airlines*.³² In *Lichten*, a passenger checked several bags containing valuables with an airline and one of the passenger's bags was mistakenly carried to another city and misdelivered to an unknown person.³³ The passenger later recovered the bag, but found that several items of jewelry were missing. At trial, the defendant airline denied liability, relying on its tariff which provided that jewelry would be carried at the risk of the passenger.

In upholding the limitation imposed by the tariff, the Second Circuit Court of Appeals reasoned that the primary purpose of the Act was to assure uniformity of rates and services.³⁴ This purpose could only be effected if the Board, rather than numerous divergent state and federal courts, had primary jurisdiction to interpret the reasonableness of air car-

²⁸ *Robert v. Pan American World Airways*, 71 Misc. 2d 991, 337 N.Y.S.2d 891 (App. Term 1972), *aff'd*, 42 A.D.2d 929, 347 N.Y.S.2d 1001 (1973).

²⁹ *Blair v. Delta Air Lines, Inc.*, 244 F. Supp. 369 (S.D. Fla. 1972), *aff'd*, 477 F.2d 564 (5th Cir. 1973); *Valentine v. Eastern Airlines, Inc.*, 144 N.J. Super. 305, 365 A.2d 475 (1976).

³⁰ "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 49 U.S.C. § 1506 (1976).

³¹ *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939 (2d Cir. 1951).

³² 189 F.2d 939 (2d Cir. 1951).

³³ *Id.* at 940.

³⁴ *Id.* at 941.

rier rates and practices.³⁵ Accordingly, the court held that the regulatory scheme, rather than the common law, governed the rights of the parties in the case.³⁶ Later courts have justified the primary jurisdiction doctrine as efficiently allowing an administrative agency to make an initial determination of legal issues that are particularly within that agency's expertise.³⁷

Courts following *Lichten* upheld tariffs that clearly abridged common law rights under the doctrine of primary jurisdiction. Air carriers' tariffs commonly limited their liability with the use of "released rates," which preset a dollar amount of liability per pound of cargo or baggage shipped. These tariffs provided that the shipper or passenger who desired extra protection against a potential loss must declare a higher value and pay a higher rate.³⁸

Frequently the shipper or passenger was not aware of the limitations and inadvertently failed to declare the higher value and pay the excess rate. For example, in *Schiff v. Emery Air Freight Corp.*,³⁹ a scientist shipped test tubes of chemicals worth \$30,000 to be used for research. The air carrier was expressly told that the container of test tubes must be shipped frozen to prevent damage to its contents. The carrier initially placed a label so designating on the container, but later negligently covered it with other labels. As a result, the test tubes were stored with other non-frozen materials and their contents deteriorated. The air carrier's tariff limited its liability to fifty cents per pound of cargo and the court upheld this limitation even though the shipper had no actual notice of the limitation.⁴⁰ Other courts similarly and consistently upheld such limitations⁴¹ and some courts even stated that the ship-

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-05 (1976); *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952).

³⁸ See, e.g., *Blair v. Delta Airlines, Inc.*, 344 F. Supp. 360, 363 (S.D. Fla. 1972), in which the tariff declared in part: "A shipment shall have declared value of \$0.50 per pound (but not less than \$50.00) unless a higher value is declared on the airbill at the time of receipt from the shipper . . ."

³⁹ 332 F. Supp. 1057 (D. Mass. 1971).

⁴⁰ *Id.* at 1059.

⁴¹ See, e.g., *Gellert v. United Airlines*, 474 F.2d 77 (10th Cir. 1973); *Vogelsang v.*

per had a duty to declare a higher value than the tariff amount to be allowed a higher recovery.⁴²

Another common tariff limited a carrier's liability for consequential damages⁴³ resulting from circumstances such as negligence, schedule changes, acts of God and mechanical malfunctions.⁴⁴ This tariff operated to reduce recovery for consequential damages resulting from delay, including loss of profits.⁴⁵ In *Gellert v. United Airlines*,⁴⁶ a shipper brought an action for delay damages resulting from an air carrier's negligence in failing to deliver clothing samples on time. The samples were to be used in a fashion show and the late arrival caused the shipper to lose most of its potential orders. The Tenth Circuit Court of Appeals expressed doubt as to whether a carrier could completely exculpate itself from consequential damages, because a carrier cannot totally exempt itself from its own negligence.⁴⁷ The court enforced a five hundred dollar limitation on such damages, however, for it was not a complete exculpation of the carrier's negligence.⁴⁸

Tariff provisions often required that a shipper or passenger

Delta Air Lines, Inc., 302 F.2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962); *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360 (S.D. Fla. 1972); *Van Steinberg v. Pacific Southwest Airlines*, 15 Av. Cas. 18,060 (Cal. Ct. App. 1980); *Delta Air Lines, Inc. v. Issacs*, 141 Ga. App. 209, 233 S.E.2d 212 (1977); *Rosenschein v. Trans World Airlines, Inc.*, 349 S.W.2d 483 (Mo. Ct. App. 1961).

⁴² *Vogelsang v. Delta Air Lines, Inc.*, 193 F. Supp. 613 (E.D.N.Y. 1961), *aff'd*, 302 F.2d 709 (2d Cir.), *cert. denied*, 371 U.S. 826 (1962); *Eastern Airlines v. Williamson*, 282 Ala. 421, 211 So. 2d 912, 915 (1968).

⁴³ Consequential damages are those damages that do not directly and immediately flow from the act of a party, but rather flow from the results of such act. *See* 5 A. CORBIN, CORBIN ON CONTRACTS § 1011 (2d ed. 1964).

⁴⁴ *See* C.A.B. Order No. 77-3-61 (Mar. 10, 1977); C.A.B. Order No. 76-3-139 (Mar. 22, 1976).

⁴⁵ *See, e.g., Gellert v. United Airlines*, 474 F.2d 77 (10th Cir. 1973); *Bruce Glen, Inc. v. Emery Air Freight Corp.*, 24 A.D.2d 145, 264 N.Y.S.2d 876 (1965); *Tannenbaum v. National Airlines, Inc.*, 13 Misc. 2d 450, 176 N.Y.S.2d 400 (App. Term 1958); *Adest v. Trans Caribbean Airways, Inc.*, 8 Av. Cas. 17,417 (N.Y. Civ. Ct. 1963).

⁴⁶ 474 F.2d 77 (10th Cir. 1973).

⁴⁷ *Id.* at 80. *See also infra* notes 135-41 and accompanying text.

⁴⁸ 474 F.2d at 86. The Board later conducted an investigation and declared certain tariffs limiting the consequential damages of cargo carriers unlawful. C.A.B. Order No. 77-3-61 (Mar. 10, 1977). Before this order could be implemented, the Board lost its power to invalidate tariff provisions upon the passage of the Air Cargo Deregulation Act. *See infra* notes 100-08 and accompanying text.

give notice to the air carrier or commence suit within a certain time as a condition precedent to recovery. Such limitations sometimes imposed very short notice requirements and have been consistently upheld in cargo and baggage cases.⁴⁹ These limitations were effective even if the air carrier had actual knowledge of the loss.⁵⁰ Courts justified these notice provisions on the basis that they allowed the carrier to quickly investigate and verify claims.⁵¹

Some air carriers developed complicated notice procedures that even a reasonably diligent shipper or passenger could misinterpret. In *Nylen v. Delta Air Lines, Inc.*,⁵² a passenger immediately notified a carrier upon the loss of his baggage. The air carrier's employee gave the passenger a form, which the passenger filled out and returned. When the passenger attempted to seek reimbursement several months later, he found that the tariff required that he take a second procedural step and send a written notice of claim to the main office within forty-five days of the loss. The Massachusetts District Court held that the first notice constituted only a request for assistance and did not operate as notice to the airline within the meaning of the tariff.⁵³ The court justified the airline's requirement of two notices to perfect a claim as having a rational basis in easing the administrative cost of a nationwide claim procedure.⁵⁴

Some courts have given less effect to tariffs, interpreting them as merely a contract between the carrier and shipper and therefore have excused the shipper from compliance with

⁴⁹ See, e.g., *Alco-Gravure Div. of Publications Corp. v. American Airlines, Inc.*, 173 F. Supp. 752 (D. Md. 1959); *Lyons v. American Airlines, Inc.*, 12 Av. Cas. 17,807 (D.C. Super. Ct. 1973); *Life Sciences, Inc. v. Emery Air Freight Corp.*, 341 So.2d 272 (Fla. Dist. Ct. App. 1977). A C.A.B. rule prohibits carriers from filing tariffs that would limit a passenger's ability to recover damages for personal injuries. See *infra* note 170.

⁵⁰ *Scheinman v. Eastern Airlines, Inc.*, 66 Misc. 2d 44, 318 N.Y.S.2d 992 (Civ. Ct. 1971).

⁵¹ *Robert v. Pan American World Airways*, 71 Misc. 2d 991, 337 N.Y.S.2d 891-92 (App. Term 1972), *aff'd*, 42 A.D.2d 929, 347 N.Y.S. 2d 1001 (1973).

⁵² 14 Av. Cas. 17,927 (Mass. Dist. Ct. 1977).

⁵³ *Id.* at 17,930-31.

⁵⁴ *Id.* at 17,931.

the tariff limitation when the carrier "fundamentally breached" the contract for carriage.⁵⁵ In *Informational Control Corp. v. United Airlines*,⁵⁶ a shipper carefully chose a specific air carrier and route to ship electronic equipment. The shipper chose the shortest nonstop route because of his experience with the incidental damage caused by loading and unloading. In contravention to the shipping contract, the carrier rerouted the shipment and the additional handling resulted in damage to the cargo. The California Court of Appeals refused to enforce the liability limitation in the tariff on the ground that the carrier's deviation from its contractual performance was so great as to completely change the risk and the terms of the contract.⁵⁷

A few courts have refused to apply the primary jurisdiction doctrine to defer to the Board's determination of the reasonableness of tariff rules.⁵⁸ *Odam v. Pacific Northern Airlines, Inc.*,⁵⁹ for example, involved property lost in a plane crash that had been carried on board by the passenger. The tariff exempted the airline from damage to unchecked baggage and personal effects. The Alaska Supreme Court refused to enforce the tariff limitation, taking a narrow view of the primary jurisdiction doctrine.⁶⁰ In the court's opinion, the doctrine required deferral to the Board only when the subject matter was within the Board's special expertise.⁶¹ The court ruled that the tariff in question did not require the Board's expertise, so

⁵⁵ See, e.g., *Information Control Corp. v. United Airlines*, 73 Cal. App. 3d 630, 140 Cal. Rptr. 877 (1977); *Philco Corp. v. Flying Tiger Line, Inc.*, 18 Mich. App. 206, 171 N.W.2d 16 (1969) (electronics equipment damaged when shipped on side). But cf. *Schift v. Emery Air Freight Corp.*, 332 F. Supp. 1057 (D. Mass. 1971) (ordinary negligence in failing to ship test tubes frozen as requested did not result in a fundamental breach).

⁵⁶ 73 Cal. App. 3d 630, 140 Cal. Rptr. 877 (1977).

⁵⁷ *Id.* at 639, 140 Cal. Rptr. at 882.

⁵⁸ *Klicker v. Northwest Airlines*, 563 F.2d 1310 (9th Cir. 1977); *Odam v. Pacific Northwest Airlines, Inc.*, 393 P.2d 112 (Alaska 1964). See also *Ravreby v. United Airlines, Inc.*, 293 N.W.2d 260 (Iowa 1980) (holding that the primary jurisdiction doctrine does not apply when a specific regulatory issue has been considered previously by the agency).

⁵⁹ 393 P.2d 112 (Alaska 1964).

⁶⁰ *Id.* at 115-16.

⁶¹ *Id.*

the court proceeded to make an independent determination of the tariff's reasonableness.⁶²

Thus, under the Act, Congress set up an extensive administrative structure that governed, among other things, the liabilities of air carriers. Air carriers were required to file tariffs with the Board, which once accepted as reasonable by the Board, preempted the common law rules in most courts.

III. DEREGULATION

A. Statutory Changes

In 1977 and 1978, Congress radically changed the entire structure of the air transportation industry by enacting the Airline Deregulation Act⁶³ and the Air Cargo Deregulation Act.⁶⁴ The Airline Deregulation Act governs all interstate air carriers and is designed to establish a system in which competitive market forces will determine the quality, variety, and price of air service.⁶⁵ The furthest reaching aspect of the Airline Deregulation Act is its so-called "sunset provisions," which provide that the Board will cease to exist on January 1, 1985.⁶⁶ At that time the Board's duties either will have been terminated or will have been transferred to other federal agencies.⁶⁷ The Board's authority to govern the rates and practices of air carriers and the statutory requirement that the carriers file tariffs ends on January 1, 1983.⁶⁸

To facilitate the deregulation process, Congress substan-

⁶² *Id.* at 116.

⁶³ Pub. L. No. 95-504, 92 Stat. 1705-54 (1978) (codified at 49 U.S.C. §§ 1301-1552).

⁶⁴ Pub. L. No. 95-163, 91 Stat. 1278-89 (1977) (codified at 49 U.S.C. §§ 1301-1552).

⁶⁵ 49 U.S.C. § 1302 (Supp. IV 1980).

⁶⁶ 49 U.S.C. § 1551 (Supp. IV 1980). By January 1, 1984, the Board will submit a comprehensive report to Congress along with an opinion concerning whether the public interest requires continuation of the Board. *Id.* § 1551(c) & (d).

⁶⁷ *Id.* § 1551(b). The Department of Justice will obtain the Board's authority to supervise mergers. The Department of Transportation will insure essential air transportation to small communities and assume authority over foreign air transportation (with consultation with the Department of State). The Postal Service will obtain the Board's authority over the carriage of mail by air. *Id.* § 1551(b)(1).

⁶⁸ *Id.* § 1551(a)(2). The Board will retain some authority between 1983 and 1985, including the power to provide compensation for air transportation to small communities and to regulate foreign air transportation. *Id.*

tially broadened the Board's authority to grant exemptions to certain classes of air carriers from the requirements of complying with the Act.⁶⁹ Prior to the adoption of the Airline Deregulation Act, the Board could grant exemptions only upon a finding of an "undue burden" upon a carrier by virtue of the limited extent of its operations or the existence of unusual circumstances affecting the carrier's operations.⁷⁰ As a result of the Airline Deregulation Act, the Board may exempt any person from complying with tariffs upon a finding that "the exemption is consistent with the public interest."⁷¹ Congress expanded the exemption power to allow the Board to relieve classes of carriers from the statutory provisions in situations where their observance would produce anomolous or inconsistent results.⁷²

The Air Cargo Deregulation Act immediately and substantially deregulated all-cargo carriers.⁷³ The Act had empowered the Board to investigate and invalidate airline rates and practices that were in the Board's opinion unjust or unreasonable or unjustly discriminatory, unduly preferential, or prejudicial or predatory.⁷⁴ Under this provision, the Board regulated cargo carrier's attempts at limiting their liability. The Air Cargo Deregulation Act terminated the Board's express authority to invalidate the tariffs of cargo carriers the Board deemed "unjust or unreasonable," although the Board continues to regulate discriminatory, preferential, prejudicial or predatory practices by all-cargo carriers.⁷⁵ The deregulation

⁶⁹ *Id.* § 1386.

⁷⁰ 49 U.S.C. § 1386 (1976)(amended 1978). The Board in 1952, for example, exempted small and irregular carriers, designated "air taxis," from the certification requirement. 14 C.F.R. § 298.3 (1982).

⁷¹ 49 U.S.C. § 1386(b)(1) (Supp. IV 1980).

⁷² REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, S. REP. NO. 631, 95th Cong., 2d Sess. 85-86 (1978) [hereinafter cited as REPORT]. The Board initially used its expanded exemption power to allow passenger carriers to settle disputes with customers, even if settlements would violate the applicable tariff. C.A.B. Order No. 78-12-49 (Dec. 2, 1978). Some airlines had previously represented to customers that they could not settle disputes in contravention of the tariff limitations, even if they so desired, without incurring criminal penalties. *Id.* at 2.

⁷³ See C.A.B. Order No. 78-12-49 (Dec. 2, 1978).

⁷⁴ 49 U.S.C. § 1482(d) (1976)(amended 1978).

⁷⁵ *Id.* § 1482(d)(3).

acts therefore require that the Board treat all-cargo carriers and passenger carriers differently; all-cargo carriers' practices may be invalidated only if discriminatory, preferential, prejudicial or predatory, while the practices of commercial passenger carriers may still be invalidated under a broader unjust or unreasonable standard.⁷⁶

B. *Reasons For Deregulation*

A Congressional change in attitude towards regulation was the impetus for the statutory amendments. Congress shifted from its previous view favoring regulation to its present view that market forces should govern the rates and practices of air carriers. The policy statement of the original Federal Aviation Act illustrates the attitude of Congress toward regulation in the 1930's.⁷⁷ The Federal Aviation Act then stressed the promotion of "efficient service by air carriers at reasonable charges without unjust discriminations, undue preferences or advantages, or *unfair or destructive competitive practices*."⁷⁸

The policy statements of the current deregulation acts illustrate Congress' changed attitude. The Airline Deregulation Act emphasizes placing "maximum reliance on competitive market forces and on actual and potential competition . . . to encourage efficient and well managed carriers to earn adequate profits and to attract capital."⁷⁹ The Air Cargo Deregulation Act favors competition to an even greater degree, for it mandates that the Board rely solely "upon competitive market forces to determine the extent, variety, quality and price of [air] services."⁸⁰

⁷⁶ *Id.* § 1482(1) & (3).

⁷⁷ For a general discussion of the background of aviation regulation, see A. LOWENFELD, *AVIATION LAW*, ch. 1 (2d ed. 1981).

⁷⁸ 49 U.S.C. § 1302(c) (1976)(amended 1978) (emphasis added).

⁷⁹ 49 U.S.C. § 1302(a)(4) (Supp. IV 1980).

⁸⁰ *Id.* § 1302(b)(2). The legislative history of the Air Cargo Deregulation Act illustrates this point:

Historically, as all-cargo air transportation expanded, it had to adapt itself to the regulatory environment rather than adapt to the demands of the marketplace. This antithetical approach to all-cargo transportation has lead to unjustified discrimination against cargo carriers. . . . The only standards that are necessary for rate regulation are the re-

Several interrelated factors influenced Congress' decision to curtail the regulatory structure.⁸¹ First, Congress recognized a growing public resentment against public regulation of all kinds.⁸² This attitude is in sharp contrast to the public perception of government regulation in the 1930's as a cure for all economic evils.⁸³ Second, Congress and the public viewed the outstanding performance of intrastate air carriers, which are beyond the control of most federal regulation, as proof that safe and efficient service is possible without extensive regulation.⁸⁴ Finally, many legislators believed that the Board's regulations caused high fares and technical inefficiency.⁸⁵ In particular, inefficient routes and Board-imposed regulations were seen as increasing the costs of for all other routes.⁸⁶

Neither the Congressional policies in the Airline Deregulation Act nor the factors influencing deregulation indicate that Congress specifically considered the effect that deregulation would have on liability limitation rules.⁸⁷ The overall purpose of the two deregulation acts is to allow market forces to govern the rates and practices of air carriers.⁸⁸ While the liability

straints that in setting rates, discrimination, preferences, and predatory pricing can be watchdogged. The market forces can adequately determine the cost of all-cargo transportation.

123 CONG. REC. § 34,663 (daily ed. Oct. 20, 1977) (remarks of Sen. Cannon).

⁸¹ See generally Kelleher, *supra* note 14, at 274-78.

⁸² A. LOWENFELD, *supra* note 77, ch. 4, § 1.1; Kelleher, *supra* note 14, at 274.

⁸³ See generally Redford, *The Significance of Belief Patterns in Economic Regulations: The Civil Aeronautics Act of 1938*, 14 W. POL. Q. 13 (1961).

⁸⁴ A. LOWENFELD, *supra* note 77, ch. 4, § 1.1; Kelleher, *supra* note 14, at 274-75.

⁸⁵ See REPORT, *supra* note 72, at 5, which states that "air transportation will be more likely to expand if the heavy hand of C.A.B. regulation is removed from the creative hand of carrier management."

⁸⁶ In senate hearings on various versions of the Cargo Deregulation Act, Senator Kennedy testified that:

[T]he fact is that current regulation brings about its own peculiar form of wasteful competition, and it exacts a fearsome cost . . . The airlines channel their competitive energies into costlier service and chase the travel dollars with frills and lavish scheduling which sends planes off across the country half empty . . . It explains why airline prices can be too high at the very same time airline profits are too low.

Hearings on S. 296 and S. 689 before the Senate Subcommittee on Aviation of the Committee on Commerce, Science and Transportation, 95th Congress, 1st Sess., pt. 1, at 101 (1977).

⁸⁷ See 49 U.S.C. § 1302 (1978 & Supp. IV 1980).

⁸⁸ See *supra* notes 79-80.

limitations that a carrier adopts in its tickets or bills of lading have been interpreted to be part of these rates and practices, it is doubtful that many shippers or passengers even notice these provisions, much less consider them in choosing an air carrier. Liability limitations usually are noticed only upon an actual loss.⁸⁹

Even if Congress did not consider the impact of deregulation on liability limitations in tariffs, tariffs as a whole are as likely a target for deregulation as any other anti-competitive airline practice. Tariffs originally served several purposes. First, they provided information to be used by the government as a tool to enforce the regulatory policy of controlling competition.⁹⁰ Second, tariffs potentially provided shippers and passengers with notice of the terms and conditions of carriage and thus promoted the statutory policy of providing uniform service.⁹¹ Third, tariffs allowed carriers to predict and limit their liability.⁹²

The first two reasons for tariffs are not as compelling as they once were. First, with the change in the regulatory policies, the Board no longer uses its power to suspend tariffs as a check on competition.⁹³ The second rationale for tariffs is also doubtful because passengers and shippers seldom examine tariffs despite their legal right to do so.⁹⁴ Even if passengers chose to read tariffs, they are too complicated for much practical use.⁹⁵ Thus, even the Board has recognized that tariffs "have merely become a defense for carriers who were faced with litigation."⁹⁶

C. *Confusion in the Transition to a Free Market*

Passenger airlines and all-cargo airlines were treated differ-

⁸⁹ See Elimination of Rules Tariffs Notice to Passengers of Conditions of Carriage, 46 Fed. Reg. 35,936 (1981).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 35,937.

⁹⁴ *Id.*

⁹⁵ See C.A.B. Order No. 79-2-106, at 3 (Feb. 15, 1979).

⁹⁶ Elimination of Rules Tariffs Notice to Passengers of Conditions of Carriage, 46 Fed. Reg. 35,936, 35,937 (1981).

ently under the deregulation acts. All airlines were required to file tariffs, but the Board had the power to reject only the tariffs of passenger carriers that were unjust and unreasonable.⁹⁷ Some shippers feared that this would allow cargo carriers to file unreasonable liability limitations in their tariffs that would be upheld by courts under the *stare decisis* of the previous primary jurisdiction cases⁹⁸ which were decided when the Board had broader powers to reject unreasonable practices.⁹⁹

This issue concerning the *stare decisis* of the primary jurisdiction cases after deregulation arose in a 1978 Order that examined the Board's power over air cargo carrier's liability limitation practices after the passage of the Air Cargo Deregulation Act.¹⁰⁰ The Order involved a pre-deregulation investigation¹⁰¹ in which the Board found that certain liability limitations used by cargo carriers were unjust and unreasonable¹⁰² and structured new tariffs in their place. The investigation results were vacated by a Court of Appeals in light of the Air Cargo Deregulation Act and remanded to the Board for a finding of its jurisdiction.¹⁰³ The Board found that the Air Cargo Deregulation Act had ended its power to find cargo liability limitations unjust and unreasonable under the Federal Aviation Act.¹⁰⁴ On the issue of primary jurisdiction, the Board rejected the shipper's contention that courts would

⁹⁷ See *supra* note 76 and accompanying text.

⁹⁸ See *Lichten v. Eastern Airlines*, 189 F.2d 939 (2d Cir. 1951), discussed *supra* at notes 31-36 and accompanying text.

⁹⁹ See Liability and Claims Rules and Practices Investigation, C.A.B. Order 78-7-100 (July 21, 1978).

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.* at 1.

¹⁰² The tariffs exempted carriers from liability for consequential damages and limited their other liability to fifty cents per pound. *Id.*

¹⁰³ *American Airlines, Inc. v. C.A.B.*, Nos. 77-1415, 77-1452 (D.C. Cir., filed May 13, 1977). See discussion in *Shippers Nat'l Freight Claim Council, Inc. v. United Airlines, Inc.*, 15 Av. Cas. 17,439 (D.D.C. 1978).

¹⁰⁴ The shippers had argued that although Congress ended the Board's express authority to find rates and practices unreasonable, Congress had only intended to deregulate rates and had no intention to have liability limitations governed by market forces. The Board disagreed, holding that the legislative history did not indicate that Congress intended to treat liability limitations differently than rates. C.A.B. Order No. 78-7-100, at 3 (July 21, 1978).

continue to defer to the Board on the reasonableness of tariff rules, stating that:

Since Congress has eliminated our responsibility for supervising the reasonableness of interstate cargo rates and services, we believe that the courts will recognize that *Lichten's* reasoning is no longer applicable. Accordingly, we would expect the courts to apply the rules of contract and tort law to interstate cargo carriers, irrespective of their tariff rules on file with the Board.¹⁰⁵

Having failed to convince the Board to overturn the tariff rules, the shippers took their case back to court. A district court in *Shipper's National Freight Claim Council, Inc. v. United Air Lines, Inc.*¹⁰⁶ agreed that the Air Cargo Deregulation Act ended the Board's power over the reasonableness of rates and practices, but refused to apply a standard of reasonableness to the practices under its own powers, noting that Congress intended for market forces to govern the reasonableness of tariffs.¹⁰⁷ The court stated in dicta, however, that "it may well be that a plaintiff could challenge the tariff rules as terms in his contract of carriage in a contract action for damages or other relief on grounds of illegality or unconscionability."¹⁰⁸

In response to the confusion over the purpose and use of tariffs after deregulation,¹⁰⁹ the Board proceeded to exempt cargo carriers from the requirement of filing tariffs¹¹⁰ under the Board's expanded authority to grant exemptions to air carriers under the Airline Deregulation Act.¹¹¹ Various air carriers challenged the Board's exemption in court as an abuse of discretion, relying on the refusal of Congress to abolish tariff

¹⁰⁵ *Id.* at 7.

¹⁰⁶ 15 Av. Cas. 17,439 (D.D.C. 1978).

¹⁰⁷ "In view of this unambiguous legislative purpose, there simply is no merit to the proposition that any standard of reasonableness of cargo rates should be enforced, whether by the Civil Aeronautics Board, or the several U.S. District Courts." *Id.* at 17,440.

¹⁰⁸ *Id.* at 17,441.

¹⁰⁹ See *National Small Shipments Traffic Conference, Inc. v. C.A.B.*, 618 F.2d 819, 824 (D.C. Cir. 1980).

¹¹⁰ 14 C.F.R. § 291.31 (1982).

¹¹¹ 49 U.S.C. § 1386 (Supp. IV 1980).

filing requirements.¹¹² A federal district court in *National Small Shipment Traffic Conference, Inc. v. C.A.B.*¹¹³ upheld the Board's exemption, finding that Congress had substantially broadened the Board's authority so that it could grant an exemption merely upon a finding that it "is consistent with the public interest to do so."¹¹⁴ The court stated that while tariffs still served a useful purpose in disseminating information to the public, the Board acted reasonably in its determination that the policies of the Air Cargo Deregulation Act would be better served without the tariff filing requirement.¹¹⁵ The court also recognized that the total deregulation of air cargo carriers would provide Congress with an example of operations in a totally deregulated air industry.¹¹⁶ Subsequently, the Board issued an interpretive rule exempting air passenger carriers from the tariff filing requirement beginning in 1983.¹¹⁷

IV. RETURN TO COMMON LAW

A. Generally

As the preceding section indicates, Congress has mandated that air cargo liability limitations now be treated by common law rules. Passenger carriers are still governed by the Board's primary jurisdiction, although this will change in 1983 when all tariff requirements are abolished.¹¹⁸ The deregulation of liability limitation rules requires a reinterpretation of common law liability.¹¹⁹ The present state of the law is unclear, for all interstate common carriers have been regulated for most of this century.¹²⁰ Air carriers are Congress' first experiment in

¹¹² See *National Small Shipments Traffic Conference, Inc. v. C.A.B.*, 618 F.2d 819 (D.C. Cir. 1980).

¹¹³ *Id.*

¹¹⁴ *Id.* at 825.

¹¹⁵ *Id.* at 826.

¹¹⁶ *Id.*

¹¹⁷ Tariffs for Post-1982 Domestic Travel, 47 Fed. Reg. 14,892 (1982) (to be codified at 14 C.F.R. § 399.40 (1982)).

¹¹⁸ See *supra* note 117 and accompanying text.

¹¹⁹ For a discussion of the state of the law before the Civil Aeronautics Act, see Pratt, *supra* note 27; Rittenberg, *supra* note 10.

¹²⁰ The Interstate Commerce Act, 49 U.S.C. § 20(11) (1976), has regulated the lia-

deregulation of liability limitations and courts today probably will not treat liability limitations in exactly the same manner as they did fifty years ago.

The tariff system under the regulatory scheme required that all carriers file their rates and practices, including liability limitations, with the Board.¹²¹ Although most courts enforced these limitations as a matter of law even when shippers or passengers had no notice of their existence,¹²² air carriers usually inserted a clause in the passenger's ticket or the bill of lading¹²³ incorporating the tariff provisions by reference. With the demise of the tariff system, air carriers will be forced to list or incorporate by reference the practices previously set forth in their tariffs. Bills of lading have always been complex, but passenger tickets are likely to become much more detailed in the future as a result of deregulation.

B. *Standard of Care of Common Carriers*

1. *Personal Injuries.* Common carriers owe their passengers a high duty of care and must use great caution to protect passengers entrusted into their custody.¹²⁴ This high duty of care is justified by the fact that "there is no [other] mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier."¹²⁵ The carrier is not, however, an insurer of the passenger's absolute safety. Li-

bility of most common carriers, including motor carriers, freight forwarders, railroads and express companies since 1906. Water carriers' liability for property damage and personal injuries is governed by 46 U.S.C. §§ 183-94 (1976). The Warsaw Convention, *supra* note 6, regulates the liability of air carriers in international transportation.

¹²¹ 49 U.S.C. § 1373 (1976)(amended 1978).

¹²² See *supra* notes 27-54 and accompanying text.

¹²³ A bill of lading, also known as an air bill or air waybill when used in air carriage, is a document describing the freight to be shipped and contains the entire contract upon which the responsibilities and liabilities of the carrier, connecting carrier, consignee and shipper rest. *E.I. DuPont de Nemours v. Schenkes Int'l Forwarders, Inc.*, 12 Av. Cas. 18,360 (N.Y. Sup. Ct. 1974). The bill of lading is also a document of title to the goods. *Southern Ry. v. Prescott*, 240 U.S. 632 (1916). It serves as evidence of the receipt and condition of goods. *Louisville & Nashville R.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 67 (1924). The Federal Bill of Lading Act (Pomerene Act), 49 U.S.C. §§ 81-124 (1976), requires bills of lading to be paid to the bearer of negotiable instruments when they are issued by a carrier in interstate commerce.

¹²⁴ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 334, at 181 (4th ed. 1971).

¹²⁵ *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933, 935 (1932).

ability, therefore, must be based upon the negligence of the carrier.¹²⁶ In addition, courts commonly apply the doctrine of *res ipsa loquitur*¹²⁷ to airplane accidents to shift the burden of proof to the carrier so that it must disprove that the accident was its fault.¹²⁸ The effect of the presumption under *res ipsa loquitur* doctrine lessens the plaintiff's difficulty in proving that an airline has breached its duty of care.¹²⁹

2. *Property Damage.* The common law also imposes a high duty of care upon the common carrier receiving goods for transportation. The common carrier is liable as an insurer, unless the loss is caused by established exceptions.¹³⁰ An injured plaintiff establishes a *prima facie* case by showing that the goods were delivered to the carrier in good condition but arrived at their destination in damaged condition.¹³¹ Proof of the *prima facie* case results in a conclusive presumption of negligence,¹³² unless the loss was caused by an act of God, the public enemy, seizure by law, inherent vice, or the fault of the shipper.¹³³ The burden of persuasion for proving that an ex-

¹²⁶ *Arrow Aviation, Inc. v. Moore*, 266 F.2d 488 (8th Cir. 1959); *Ness v. West Coast Airlines, Inc.*, 90 Idaho 111, 410 P.2d 965 (1965); *Cudney v. Midcontinental Airlines, Inc.*, 303 Mo. 922, 254 S.W.2d 612 (1953); *Crowell v. Eastern Airlines, Inc.*, 240 N.C. 80, 81 S.E.2d 178 (1954).

¹²⁷ *Res ipsa loquitur* is a rule of evidence whereby the negligence of an alleged wrongdoer may be inferred from the mere fact that the accident happened provided that the character of the accident and the circumstances surrounding it lead reasonably to the belief that in the absence of negligence it would not have occurred and the instrument which caused injury is shown to have been in the exclusive control of the alleged wrongdoer. *Cox v. Northeast Airlines, Inc.*, 379 F.2d 893, 894-5 (7th Cir. 1967).

¹²⁸ *Id.* See also *Smith v. Pacific Alaska Airways, Inc.*, 89 F.2d 253 (9th Cir. 1937); *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932); *Robert v. Trans World Airlines*, 225 Cal. App. 2d 344, 37 Cal. Rptr. 291 (1964). But see, *Jackson v. Stancil*, 253 N.C. 291, 116 S.E.2d 817 (1960); *Woodall Flying Service, Inc. v. Thomas*, 27 N.C. App. 171, 218 S.E.2d 203 (1975).

¹²⁹ See, e.g., *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893, 895 (7th Cir. 1967).

¹³⁰ W. PROSSER, *supra* note 124, § 34, at 180.

¹³¹ *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138 (1964); *Delta Airlines, Inc. v. Isaacs*, 141 Ga. App. 209, 233 S.E.2d 212, 213 (1977); *Travelers Ins. Co. v. Delta Airlines, Inc.*, 498 S.W.2d 443, 446-47 (Tex. Civ. App.—Texarkana 1973, no writ). See generally S. SORKIN, *How to Recover for Loss or Damage to Goods in Transit*, ch. 5 (1976 & Supp. 1982).

¹³² *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964).

¹³³ S. WILLISTON, *WILLISTON ON CONTRACTS* §§ 1103-08 (3d ed. 1967).

cepted peril caused the damage rests on the carrier,¹³⁴ resulting in an effect not unlike *res ipsa loquitor*.

C. Limitations on Recovery for Property Damage

Common carriers attempted very early to relieve themselves of the effect of their common law duty by limiting their liability in their contracts of carriage. Courts traditionally have been hostile to some limitations and the common law developed a rule that no contract could exempt a common carrier from liability for its own negligence.¹³⁵ In an early case, *New York Central Railroad Co. v. Lockwood*,¹³⁶ a drover¹³⁷ was injured while traveling with his cattle under a contract that exempted the carrier for all liability for the carrier's negligence. The Supreme Court refused to enforce the limitation, holding that a common carrier cannot exempt itself from the negligence of itself or its servants.¹³⁸ Courts have viewed such a limitation as an attempt by the carrier to put off the essential duties of its employment.¹³⁹

This rule rejecting limitations on liability has been justified on two grounds in property cases. First, it induces carriers to use sufficient care and watchfulness in protecting goods shipped.¹⁴⁰ Second, courts have recognized that the carrier

¹³⁴ *Missouri Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (1964); *Loop Cold Storage Co. v. South Tex. Packers, Inc.*, 483 S.W.2d 914, 918 (Tex. Civ. App.—Corpus Christi 1972), *rev'd on other grounds*, 491 S.W.2d 106 (Tex. 1973).

¹³⁵ PROSSER, *supra* note 124, § 68, at 443.

¹³⁶ 84 U.S. 357 (1873).

¹³⁷ A drover drives a herd of cattle from the ranch to market.

¹³⁸ *Id.* at 378. See also *Inman v. South Carolina Ry. Co.*, 129 U.S. 128 (1889).

¹³⁹ *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 136 (1953) (quoting *Santa Fe, P. & P. Ry. Co. v. Grant Bros. Const. Co.*, 228 U.S. 177, 184-85 (1913)).

¹⁴⁰ The Supreme Court in one case stated that:

The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner entrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors and makes common carriage more unreliable.

Bank of Kentucky v. Adams Express Co., 93 U.S. 174, 183 (1876). See also *Russell v. Pittsburgh, C.C. & St. L. Ry. Co.*, 157 Ind. 305, 61 N.E. 678 (1901); *Smith v. New*

and the individual shipper are not on equal footing and that "[t]he latter cannot afford to h[a]ggle or stand out and seek redress in the courts."¹⁴¹

The Supreme Court modified this strict rule with respect to property damage in the case *Hart v. Pennsylvania Railroad Co.*,¹⁴² in which the Court allowed a carrier to limit its liability with a "released rate" clause.¹⁴³ Such a clause limits a carrier's liability to a preset amount, which the shipper may only increase by paying an increased rate. In *Hart*, a shipper transported horses pursuant to a bill of lading that limited the value of the horses to two hundred dollars apiece. Two horses, which the shipper later claimed to be race horses worth \$15,000, were killed as a result of the railroad's negligence.¹⁴⁴ The Court upheld the limitation, reasoning that the limitation on liability did not induce want of care as would a total exemption, because the limitation exacted from the carrier a measure of care equal to the value agreed upon by the parties.¹⁴⁵ The Court did not worry that the limitation might violate public policy; on the contrary, the Court stated that any other holding would allow the shipper the windfall of a lower contract price for greater protection if there was no loss.¹⁴⁶

The Court later stressed that only by offering the shipper the opportunity to choose between released rates could such a clause withstand judicial scrutiny.¹⁴⁷ This opportunity was of little consequence to shippers who did not read their bills of lading closely, for the courts enforced recitals in the contract that required the shipper to affirmatively state a higher rate

York, Cent. R.R., 24 N.Y. 222 (1862).

¹⁴¹ *Santa Fe P. & P. Ry. Co. v. Grant Bros. Constr. Co.*, 228 U.S. 177, 185 (1913). See also *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 136 (1953); *Liverpool & Great W. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 441 (1889).

¹⁴² 112 U.S. 331 (1884).

¹⁴³ *Id.* at 343. See also *Union Pac. R.R. Co. v. Burke*, 255 U.S. 317 (1921).

¹⁴⁴ 112 U.S. at 334-37.

¹⁴⁵ *Id.* at 340.

¹⁴⁶ *Id.* at 341. The Court later noted in *Adams Express Co. v. Croninger*, 226 U.S. 491, 509 (1913) that the carrier "has an inherent right to receive a compensation commensurate with the risk involved."

¹⁴⁷ *Boston & M. R.R. v. Piper*, 246 U.S. 439 (1918).

or be bound by one set out by the carrier.¹⁴⁸ The Supreme Court noted in one case "[t]hat no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case."¹⁴⁹ Some earlier cases, decided under state law, required the carrier to make a greater effort to give the shipper actual notice.¹⁵⁰ These cases, however, were effectively overruled by the Cummins Amendment to the Interstate Commerce Act, which expressly allows a carrier to limit its liability, provided that the limitation is approved by the Interstate Commerce Commission and the shipper can obtain increased protection by paying a higher rate.¹⁵¹

D. *Limitations on Recovery For Personal Injuries*

1. *Limitations on the Amount of Recovery.* As with the property cases discussed above,¹⁵² the common law did not allow a common carrier to exempt itself totally from liability for its own negligence for personal injury to its passengers.¹⁵³ The policy reasons for encouraging a high standard of care are even more compelling when personal injury is involved.¹⁵⁴ Unlike the property cases, the common law did not allow a common carrier to limit its liability by offering released rates to its passengers and rejected such limitations as contrary to public policy.¹⁵⁵

¹⁴⁸ *American R.R. Express Co. v. Lindenberg*, 260 U.S. 584 (1923); *Wells, Fargo & Co. v. Neiman-Marcus, Co.*, 227 U.S. 469 (1913).

¹⁴⁹ *Adams Express Co. v. Croninger*, 226 U.S. 491, 508 (1913).

¹⁵⁰ See, e.g., *Hayes v. Adams Express Co.*, 74 N.J.L. 537, 65 A. 1044 (1907) (stressing the need for a bona fide agreement as to the value of property to be shipped in order to bind the shipper to the limitation); *Schutte v. Weir*, 59 Misc. 438, 111 N.Y.S. 240 (App. Term 1908) (holding that a receipt that had been rubber stamped "[v]alue asked for and not given . . ." was ineffective to limit the carrier's liability).

¹⁵¹ 49 U.S.C. § 20(11) (1976).

¹⁵² See *supra* notes 136-41 and accompanying text.

¹⁵³ See *New York Cent. R.R. Co. v. Lockwood*, 84 U.S. 357 (1873). See also *supra* notes 136-38 and accompanying text.

¹⁵⁴ See *supra* note 125 and accompanying text.

¹⁵⁵ *Curtiss-Wright Flying Serv. Inc. v. Glose*, 66 F.2d 710, 713 (3d Cir. 1933) (holding that "common carriers, in dealing with passengers, cannot compel them to so release their legal liability for their own negligence"); *Allison v. Standard Air Lines, Inc.*, [1930] U.S. Av. R. 292, 298 (S.D. Cal.), *aff'd*, 65 F.2d 668 (9th Cir. 1933) (noting that "the issuance of a ticket with provision printed thereon such as have been placed

*Conklin v. Canadian-Colonial Airways, Inc.*¹⁵⁶ involved a wrongful death suit in which the defendant airline offered released passenger rates printed on the ticket. The passenger was allowed to choose between \$5,000, \$10,000 or \$15,000 liability limitations, depending upon the amount paid for passage. The New York Court of Appeals invalidated the liability limitation, relying upon an earlier case that prohibited carriers from totally exempting themselves from liability.¹⁵⁷ The passenger's lack of bargaining power also seems to have influenced the court.¹⁵⁸ Limitations on an air carrier's liability for personal injuries are allowed, however, in international flights¹⁵⁹ and in some foreign countries.¹⁶⁰

in evidence does not change the relation of the parties in this action"); *Law v. Transcontinental Air Transport, Inc.* [1931] U.S. Av. R. 205, 214 (E.D. Pa.) ("[n]o common carrier has a right to ask its passengers to relieve it of failure on its part to perform the duty of care which the law requires of it."); *Conklin v. Canadian-Colonial Airways*, 286 N.Y. 244, 190 N.E. 692 (1935).

¹⁵⁶ 266 N.Y. 244, 194 N.E. 692 (1935).

¹⁵⁷ 194 N.E. at 693. The court relied upon *New York Cent. R.R. Co. v. Lockwood*, 84 U.S. 357 (1873).

¹⁵⁸ 194 N.E. at 694. One modern case applied this rule to invalidate a detailed release that exculpated a parachute school from its own negligence when a student was killed in a fall. In *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306 (1979), the court stated: "[T]he law's reluctance to enforce exculpatory provisions of this nature has resulted in the development of an exacting standard by which courts measure their validity." *Id.* at 309. But see *Gold v. Swiss Air Transp. Co.*, 33 A.D.2d 777, 307 N.Y.S. 2d 832 (1969), which suggests in dicta that a limitation on damages for personal injury might be enforceable if the passenger was given a choice of rates. *Id.*

¹⁵⁹ Article 22 of the Warsaw Convention, *supra* note 6, limits an international air carrier's liability for personal injuries to a maximum of 125,000 gold francs (approximately 10,000 U.S. dollars) for each passenger. Air carriers flying to, from, or stopping in the United States have signed the Montreal Agreement, May 13, 1966, 49 U.S.C. § 1502, note, ICAO Doc. No. 8584-LC/154-1, whereby these carriers increase their potential liability to \$75,000. See generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967); Comment, *From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention*, 45 J. AIR L. & COM. 653 (1980).

¹⁶⁰ English and Canadian cases have allowed carriers to limit their liability for personal injuries so long as the carrier takes reasonable steps to give the passenger notice of the limitation. See, e.g., *Ludditt v. Ginder Coote Airways, Ltd.*, [1942] 4 D.L.R. 353 (Can.), (holding that "a carrier of passengers can contract out liability which attaches to him"), reprinted in [1942] U.S. Av. R. 178; *McKay & Craigie v. Scottish Airways, Ltd.*, 1948 Ses. Cas. 254 (Scot.) (holding that clear and unambiguous language will suffice to exclude common law liability), reprinted in [1948] U.S. Av. R. 76; 1 C. SHAWCROSS & M. BEAUMONT, *AIR LAW* 94-96, 377 (4th ed. 1977)(discussing English law).

2. *Requirements of Notice and Commencement of Suit Within a Specific Time.* Although courts have strictly prohibited carriers from limiting their liability for personal injuries, they have taken a more lenient position with regard to requirements of notice or commencement of suit within a specific time as a condition to recovery. Such limitations have been upheld, so long as the time allowed has not been ridiculously short.¹⁶¹ The difference in the court's approach to limitations on the amount of personal injury recovery and the court's approach to limitations on the time to give notice or file suit on a personal injury claim may in some instances emphasize form over substance, for a short notice or filing requirement may exculpate a carrier to a greater degree than a similar limitation on damages.

The leading Supreme Court case in this area is *Gooch v. Oregon Short Line Railroad Co.*,¹⁶² in which a drover's pass¹⁶³ conditioned liability upon a requirement that the injured party give notice to the railroad within thirty days of injury. The Court upheld the notice provision, stating that "a stipulation for written notice within a reasonable time stands on a different footing" from an exoneration from negligence.¹⁶⁴ The Court did not hold that all notice requirements would be enforced, noting that "an exception might be implied if the accident made notice within the time impracticable."¹⁶⁵ The Court justified its holding as providing carriers with some safeguard against fraud.¹⁶⁶ One court allowed a forty day notice limitation, reasoning that if "claims may be presented at any time within the term of years permitted by the statute of limitations, the opportunity for investigation will often be lost beyond recall."¹⁶⁷ At common law, courts also required that

¹⁶¹ See, e.g., *Oceanic Steam Navigation Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925) (holding that a three day notice provision was unreasonable).

¹⁶² 258 U.S. 22 (1922).

¹⁶³ A drover's pass is a free pass given by a railroad company, accepting a drove of cattle for transportation, to the drover who accompanies and cares for the cattle on the train. BLACK'S LAW DICTIONARY 446 (Rev. 5th ed. 1979).

¹⁶⁴ 258 U.S. at 24.

¹⁶⁵ *Id.* at 25.

¹⁶⁶ *Id.*

¹⁶⁷ *Murray v. Cunard S.S. Co.*, 235 N.Y. 162, 139 N.E. 226, 228 (1923) (Cardozo, J.).

these conditions be expressly stated on the ticket.¹⁶⁸

Until 1954, air carriers commonly included notice and commencement of suit conditions in their tariffs.¹⁶⁹ In that year the Board promulgated a regulation prohibiting tariff rules that contained any limitation or condition on an air carrier's liability for personal injury.¹⁷⁰ Since that time, such limitations have not been allowed. Before the Board regulation, however, many air cases involving personal injuries upheld the validity of these conditions. While some of these cases were based upon the doctrine of primary jurisdiction,¹⁷¹ other cases upheld these conditions without relying upon the Board's statutory authority.¹⁷² In *Wilhelmy v. Northwest Airlines, Inc.*,¹⁷³ the plaintiff alleged that an air carrier was negligent in descending at a too rapid rate, which resulted in injury to the plaintiff's inner ear and throat. The applicable tariff required written notice of the claim within thirty days and the commencement of suit within one year of injury.¹⁷⁴ The federal district court held that the plaintiff's failure to comply with the tariff provisions barred the action.¹⁷⁵ The court rejected the plaintiff's challenge to the validity of the conditions, finding them "reasonable and valid."¹⁷⁶

Other courts during this period refused to uphold these

¹⁶⁸ See *The Majestic*, 166 U.S. 375, 386 (1897). See *infra* notes 199-203 and accompanying text.

¹⁶⁹ See *infra* text accompanying note 174.

¹⁷⁰ 14 C.F.R. 221.38(h) (1982) provides:

No provisions of the Board's regulations issued under this part or elsewhere shall be construed to require on or after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carriers's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms.

¹⁷¹ *Herman v. Northwest Airlines, Inc.*, 222 F.2d 326 (2d Cir.), *cert. denied*, 350 U.S. 843 (1955); *Brandt v. Eastern Air Lines, Inc.*, [1948] U.S. Av. R. 637 (S.D.N.Y.).

¹⁷² *Wilhelmy v. Northwest Airlines, Inc.*, 86 F. Supp. 565 (W.D. Wash. 1949); *Indemnity Ins. Co. of N. Am. v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Sheldon v. Pan American Airways, Inc.*, 190 Misc. 537, 74 N.Y.S.2d 578 (Sup. Ct.), *aff'd*, 272 A.D. 1000, 74 N.Y.S.2d 267 (1947).

¹⁷³ 86 F. Supp. 565 (W.D. Wash. 1949).

¹⁷⁴ *Id.* at 566.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

conditions.¹⁷⁷ These cases all accepted *Gooch*¹⁷⁸ as controlling to allow some limitations, but objected that the tariff did not give adequate notice to the passengers. In *Shortley v. Northwestern Airlines*,¹⁷⁹ a passenger alleged that he had been injured during an airplane landing. Printed on the face of the ticket was a statement that the passage was subject to all conditions of contract.¹⁸⁰ Attached to the ticket was a small booklet which stated that the "time limits for giving notice of claims and the institution of suit are set forth in the Carrier's tariff."¹⁸¹ The passenger did not comply with the ten day notice provision and one year time limit for bringing suit set forth in the tariff. The federal district court refused to enforce the conditions because they did not give the passenger sufficient notice.¹⁸² The court recognized that such limitations could be permissible, but required that the carrier make a greater effort to notify the passenger of the conditions than merely incorporating the tariff's terms by reference.¹⁸³ The court viewed the tariff as only a schedule of rates and charges, in which a reasonable man would not expect to find liability limitations included.¹⁸⁴

Apparently, *Shortley* and the cases following it would have upheld the conditions if they had been set forth on the ticket in bold print. As mentioned above, air carriers cannot rely on these conditions because the Board has found them unreasonable.¹⁸⁵ The Board's determination of invalidity will no longer restrict air passenger carriers, however, when the Board loses

¹⁷⁷ *Turoff v. Eastern Airlines, Inc.*, 129 F. Supp. 319, 321 (N.D. Ill. 1955); *Bernard v. United States Air Coach*, 117 F. Supp. 134, 138 (S.D. Cal. 1953); *Toman v. Mid-Continent Airlines, Inc.*, 107 F. Supp. 345, 346 (W.D. Mo. 1952); *Thomas v. American Airlines, Inc.*, 104 F. Supp. 650, 651 (E.D. Ark. 1952); *Shortly v. Northwestern Airlines*, 104 F. Supp. 152, 155 (D.D.C. 1952); *Glenn v. Compania Cubana de Aviacion, S.A.*, 102 F. Supp. 631, 634 (S.D. Fla. 1952); *Crowell v. Eastern Airlines, Inc.*, 240 N.C. 20, 81 S.E.2d 178, 186 (1954).

¹⁷⁸ See *supra* notes 162-66 and accompanying text.

¹⁷⁹ 104 F. Supp. 152 (D.D.C. 1952).

¹⁸⁰ *Id.* at 154.

¹⁸¹ *Id.*

¹⁸² *Id.* at 155-56.

¹⁸³ *Id.* at 155.

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* note 170 and accompanying text.

its power to declare practices unreasonable as a result of the deregulation acts. Other common carriers are regulated by statute in this respect.¹⁸⁶ Any common law restriction on the ability of air carriers to limit their liability will derive from notions of notice and unconscionability.

IV. TICKETS AND BILLS OF LADING AS CONTRACTS OF ADHESION

A. Generally

As discussed previously, there has been no pure common law of common carriers since the early part of this century when common carriers were free of most regulation.¹⁸⁷ One major difference between the common law then and what courts might apply as common law today has been an increased recognition of so-called "contracts of adhesion."¹⁸⁸ Such contracts have been defined as standardized forms containing oppressive provisions which are imposed upon the in-

¹⁸⁶ Steamship companies are prohibited from imposing unreasonably short notice and commencement of suit conditions by 46 U.S.C. § 183b(a) (1976), which provides:

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

Before this section was passed in 1936, some steamship companies imposed extremely short notice of injury limitation and courts found notice limitations as short as fifteen days reasonable. See *Baron v. Campagnie Generale Transatlantique*, 108 F.2d 21, 23 (2d Cir. 1939). Overland carriers are governed by the Interstate Commerce Act, 49 U.S.C. § 20(11) (1976), which provides that:

It shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

¹⁸⁷ See *supra* note 120 and accompanying text.

¹⁸⁸ See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

dividual who has no cognizance of their existence.¹⁸⁹ Recognition of adhesion contracts involves looking beyond the terms of the written contract to the surrounding conditions, including the relative bargaining position of the parties.¹⁹⁰ Courts refusing to recognize contracts of adhesion worry that the danger of paternalism by the courts is greater than the danger of enforcing some one-sided bargains.¹⁹¹

While the adhesiveness of any particular contract may be difficult to define, courts and commentators have enumerated certain factors that in combination suggest adhesion. First, central to an adhesion contract is the use of "boilerplate" language by the party in the stronger bargaining position, who offers the contract to the party in the weaker bargaining position on a take it or leave it basis.¹⁹² Second, contracts of adhesion often involve hidden clauses in fine print that are disadvantageous to the party in the weaker bargaining position.¹⁹³ Third, the language of the contract is often incomprehensible to the layman.¹⁹⁴ Fourth, there is usually an overall imbalance in the rights and obligations imposed by the contract along with inequality of bargaining power.¹⁹⁵ Finally, the injured party is often underprivileged and uneducated.¹⁹⁶ Some courts, however, have been quick to point out that inequality

¹⁸⁹ J. MURRAY, MURRAY ON CONTRACTS § 350, at 348 (2d ed. 1974).

¹⁹⁰ *Id.* § 350.

¹⁹¹ The Supreme Court of Utah summed up this idea when it stated:

People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side.

Carlson v. Hamilton, 8 Utah 2d 272, 332 P.2d 989, 990-91 (1958).

¹⁹² See Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 87 (1960).

¹⁹³ Henningsen v. Bloomfield Motors, Inc., 161 A.2d at 87-88.

¹⁹⁴ *Id.* at 88.

¹⁹⁵ See Wheeler v. St. Joseph Hosp., 63 Cal. App. 3d 345, 133 Cal. Rptr. 775 (1976); Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 549 P.2d 903, 907 (1976); Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Cty. Ct.), *aff'd*, 84 Misc. 2d 782, 386 N.Y.S.2d 176 (App. Term 1975).

¹⁹⁶ See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Jones v. Star Credit Corp., 52 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); Jefferson Credit Corp. v. Marcarno, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

of bargaining power alone is not enough to make a contract adhesive.¹⁹⁷ Otherwise, the mere fact that an individual contracts with an industrial giant would be enough for the individual to render the contract unenforceable.¹⁹⁸ Some other proof of unfairness must be demonstrated.

Liability limitations in bills of lading and passenger tickets are a likely place for some courts today to apply the concepts of contracts of adhesion. A hurried passenger running for a plane does not closely examine a ticket for exculpatory clauses. Shippers, on the other hand, are not rushed into signing a bill of lading, but the provisions may be so complicated as to be unintelligible. Even if intelligible, the shipper or passenger has no real bargaining power and no real choice if all carriers have similar exculpatory provisions in their contracts. The remaining analysis collects cases from areas related to commercial air travel that indicate that some courts will refuse to uphold air carrier's attempts to limit their liability in certain situations.

B. *The Admiralty Law Approach*

Steamship carriers commonly insert notice and commencement of suit requirements into a detailed contract of carriage, which is incorporated by reference on the front of the passenger ticket. No tariff system regulates steamship tickets; therefore, the analysis of these provisions is analogous to the analysis of similar airline tickets in the soon to be deregulated air carrier industry.

The degree to which these incorporations would be binding on injured passengers was initially examined by the Supreme Court in *The Majestic*.¹⁹⁹ The case involved an exculpatory clause that limited the carrier's liability for baggage allegedly damaged. The carrier printed "notice to passengers" on the front of the ticket along with a note to "see back." On the reverse side of the ticket was a provision in small print limit-

¹⁹⁷ *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903, 907 (1976).

¹⁹⁸ *Id.* See also Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 766-67 (1969).

¹⁹⁹ 166 U.S. 375 (1897).

ing the carrier's liability for lost baggage.²⁰⁰ The passengers bringing suit had not read nor had their attention been called to the limitations.²⁰¹ The Court refused to limit the carrier's liability, holding that the reference on the front of the ticket was not specific enough to incorporate the provisions on the back.²⁰² The Court required that "when a company desires to impose special and most stringent terms upon its customers in exoneration of its own liability, there is nothing unreasonable in requiring that the terms should be distinctly declared and deliberately accepted."²⁰³ Many courts have followed *The Majestic* in invalidating similar provisions.²⁰⁴

Other courts, however, were reluctant to follow the analysis in *The Majestic*. In *Murray v. Cunard S.S. Co.*,²⁰⁵ a passenger was injured when a ship lurched. The ticket contained notice and commencement of suit limitations similar to those in *The Majestic*.²⁰⁶ The court held the conditions to be effective, finding that the incorporation provision was specific enough to "wrought in" the limitation on the back of the ticket.²⁰⁷ The court did not find enforcement of the condition laden ticket inequitable; on the contrary, the court noted that:

This ticket, to the most casual observer, is as plainly a contract, burdened with all kinds of conditions, as if it were a bill of lading or a policy of insurance. No one who could read could glance at it without seeing that it undertook . . . to prescribe the particulars which should govern the conduct of the parties until the passenger reached the port of destination.²⁰⁸

More recent cases have placed a greater emphasis on the

²⁰⁰ *Id.* at 376-78.

²⁰¹ *Id.* at 385.

²⁰² *Id.*

²⁰³ *Id.* at 386.

²⁰⁴ *Maibrunn v. Hamburg-American S.S. Co.*, 77 F.2d 304 (2d Cir. 1935); *Baer v. North German Lloyd*, 69 F.2d 88 (2d Cir. 1934); *Toohill v. Cunard S.S. Co.*, 130 F. Supp. 128 (D. Mass. 1955).

²⁰⁵ 235 N.Y. 162, 139 N.E. 226 (1923) (Cardozo, J.).

²⁰⁶ 139 N.E. at 228.

²⁰⁷ *Id. Accord Schwartz v. S.S. Nassau*, 345 F.2d 465 (2d Cir.), *cert. denied*, 382 U.S. 919 (1965).

²⁰⁸ 139 N.E. at 228.

carrier's attempt to communicate its conditions to the passenger.²⁰⁹ One court²¹⁰ refused to enforce a one year limitation on filing suit despite the fact that the conditions were printed upon the face of the ticket so that no incorporation was necessary.²¹¹ The court refused to enforce the condition on the ground that it was "not sufficiently eye-catching"²¹² and that the carrier had done nothing "to impress the importance of the terms and conditions upon the passenger."²¹³

Not all recent cases, however, refuse to enforce such provisions. In *De Nicola v. Cunard Line Ltd.*,²¹⁴ a passenger was injured when a ship lurched in high seas. On the face of the ticket was a statement directing the passenger to terms and conditions within an accompanying eighteen page booklet.²¹⁵ The First Circuit Court of Appeals upheld the notice limitations, stating that the central concern was a "sensitive inquiry into the 'communicativeness' of all warnings of the ticket conditions,"²¹⁶ but held that the carrier had done all that it could reasonably do to warn the passenger of the conditions existence and importance by having had the passenger sign a separate document which listed in readable print the terms and conditions of contract.²¹⁷

C. *Limitations of Liability Under the Warsaw Convention*

The Warsaw Convention²¹⁸ governs international aviation litigation. The reluctance of American courts to enforce the liability provisions of the Convention without adequate notice to passengers illustrates a judicial policy against all such lia-

²⁰⁹ See, e.g., *DeNicola v. Cunard Line, Ltd.*, 642 F.2d 5 (1st Cir. 1981); *McQuillan v. Italia Societa Per Azione Di Navigazione*, 386 F. Supp. 462 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975).

²¹⁰ *Silvestri v. Italia Societa Per Azione Di Navigazione*, 388 F.2d 11 (2d Cir. 1968).

²¹¹ *Id.* at 18.

²¹² *Id.*

²¹³ *Id.* at 17.

²¹⁴ 642 F.2d 5 (1st Cir. 1981).

²¹⁵ *Id.* at 10.

²¹⁶ *Id.*

²¹⁷ *Id.* at 11. See also *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979); *Gardner v. Greek Line*, 388 F. Supp. 856 (M.D. Pa. 1975); *Lipton v. National Hellenic Am. Lines*, 294 F. Supp. 308 (E.D.N.Y. 1968).

²¹⁸ *Supra* note 6. See also *supra* note 159.

bility limitations. Article three of the Convention requires that a ticket must be "delivered" if the air carrier is to take advantage of the Convention's provisions limiting liability.²¹⁹ The delivery of the ticket must include a statement that the transportation is subject to the rules limiting liability established by the Convention.²²⁰ Even when a ticket with stated liability limitations is physically delivered to the passenger, American courts have refused to consider the ticket delivered within the meaning of the Convention if the ticket is not reasonably readable so that it gives adequate notice to the passenger of the conditions of carriage.

The first case to find that inadequate notice could constitute failure of delivery was *Lisi v. Alitalia-Linee Aeree Italiane*,²²¹ which involved an airplane crash in Ireland. The defendant airline plead the liability limitations under the Convention. The federal district court read the delivery provision to require that the air carrier afford "the passenger a reasonable opportunity to protect himself against the airline's exclusion or limitation of liability."²²² Applying this rule, the court found the conditions of contract that were printed on page five of a ticket booklet in microscopic print to be "unnoticeable, unreadable and virtually invisible."²²³

²¹⁹ Article 3 provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

Warsaw Convention, *supra* note 6, art. 3.

²²⁰ *Id.*

²²¹ 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

²²² 253 F. Supp. at 239.

²²³ *Id.* at 243. The conditions were printed in 4½ point type which the court characterized as "artfully camouflaged." *Id.* A dissenting judge in the court of appeals opinion accused the court of judicial treaty-making. 370 F.2d at 515 (J., Moore, dis-

Many American courts have followed the rule in *Lisi*.²²⁴ For example, *Egan v. Kollsman Instrument Corp.*²²⁵ involved a ticket with very small print, similar to the ticket in *Lisi*. The New York Court of Appeals held that "a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention."²²⁶ The court based its opinion on what it perceived as a "national policy requiring that air carriers give passengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence."²²⁷ The court also noted that proper notice would give the passenger "the opportunity to purchase additional flight insurance or to take [other additional] steps for his self-protection. . . ."²²⁸

senting). Canada, Italy and the United Kingdom made this same point in amicus curiae briefs to the Supreme Court. See A. LOWENFELD, *supra* note 77, ch. 7, § 3.32.

²²⁴ *Boryk v. Argentinas*, 332 F. Supp. 405 (S.D.N.Y. 1971); *Bayless v. S.A. Empress de Viacao Aerea Rio Grandense*, 10 Av. Cas. 17,881 (S.D.N.Y. 1968); *Egan v. Kollsman Instrument Corp.*, 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968); *Greenberg v. United Airlines*, 98 Misc. 2d 44, 424 N.Y.S.2d 240 (N.Y. Civ. Ct. 1979). Compare *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237 (S.D.N.Y.), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd*, 340 U.S. 455 (1968) (holding that 4½ point print was unreadable) with *Millikin Trust Co. v. Iberia Lineas Aereas de Espana, S. A.*, 11 Av. Cas. 17,331, 17,333 (N.Y. Sup. Ct. 1969) (holding that notice was sufficient, stating "the notice contained on the ticket in this instance is at least in print twice the size of that contained in *Lisi* . . . [t]he eight point print is easily readable and quickly noticable"). Several American cases, however, have refused to extend the reasoning of *Lisi* to domestic air cases. See *Sechler v. Trans World Airlines, Inc.*, 12 Av. Cas. 18,185 (Cal. App. 1973); *Robert v. Pan American World Airways, Inc.*, 71 Misc. 2d 991, 337 N.Y.S.2d 891 (App. Term 1972), *aff'd*, 42 A.D.2d 929, 347 N.Y.S.2d 1001 (1973); *Martin v. Trans World Airlines, Inc.*, 219 Pa. Super. 42, 280 A.2d 647 (1971); *Parker v. Pan American World Airways*, 447 S.W.2d 731 (Tex. Civ. App.—Dallas 1969, no writ). Cf. *Montreal Trust Co. v. Canadian Pac. Air Lines, Ltd.*, 72 D.L.R.3d 257 (Can. 1976), in which the Canadian Supreme Court held that microscopic print did not constitute sufficient notice under the provisions of the Warsaw Convention.

²²⁵ 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967), *cert. denied*, 390 U.S. 1039 (1968).

²²⁶ *Id.* at 169, 234 N.E.2d at 203, 287 N.Y.S.2d at 19-20.

²²⁷ *Id.* at 171, 234 N.E.2d at 204, 287 N.Y.S.2d at 21-22.

²²⁸ *Id.* at 170, 234 N.E.2d at 204, 287 N.Y.S.2d at 21. Cf. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 512-13 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

D. *Unconscionability Under the Uniform Commercial Code*

Article two of the Uniform Commercial Code (U.C.C.)²²⁹ specifically authorizes a court not to enforce unconscionable contractual clauses. Section 2-302 provides:

If the court as a matter of law finds that the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.²³⁰

While the U.C.C. applies only to the sale of goods, it purports to explicitly codify practices of the common law²³¹ and is influential outside of the sales area.²³²

Section 2-302 does not expressly define unconscionability, nor attempt to enumerate factors constituting unconscionability. A comment to the provision attempts to provide some illumination, stating that "[t]he principle is one of prevention of unfair surprise," but not "the disturbance of allocation of risks because of superior bargaining power."²³³ A distinction has been drawn between procedural unconscionability, which relates to matters leading up to the formation of a contract,

²²⁹ Article two of the Uniform Commercial Code has been adopted in every state except Louisiana. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 1 (2d ed. 1980) [hereinafter cited as WHITE & SUMMERS].

²³⁰ U.C.C. § 2-302(1) (1978).

²³¹ U.C.C. § 2-302, comment 1 (1978).

²³² The RESTATEMENT (SECOND) OF CONTRACTS has recently adopted an unconscionability provision based upon U.C.C. § 2-302 (1978) and the case law decided thereunder. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). A comment to the Restatement provision provides:

Uniform Commercial Code § 2-302 is literally inapplicable to contracts not involving the sale of goods, but it has proven very influential in non-sales cases. It has many times been used either by analogy or because it was felt to embody a generally accepted social attitude of fairness going beyond its statutory application to sales of goods.

Id. comment a. Section 2-302 is cited more often in non-commercial cases, but U.C.C. § 2-719 (1978), which expressly provides that limitations on consequential damages may be unconscionable, may also be applied by analogy. *See, e.g.,* Shippers Nat'l Freight Claim Council, Inc. v. United Airlines, Inc., 15 Av. Cas. 17,439, 17,441 (D.D.C. 1978) (Suggesting U.C.C. § 2-302 was applicable to airline contracts of carriage).

²³³ U.C.C. § 2-302, comment 1 (1978).

and substantive unconscionability, which relates to terms of the contract.²³⁴

An instrumental case in interpreting Section 2-302, *Williams v. Walker Thomas Furniture Co.*,²³⁵ identified unconscionability as including "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."²³⁶ The court further noted that ordinarily one who signs an agreement without full knowledge of its terms is held to assume the risk of entering a one-sided bargain, but that when a party with little bargaining power enters into a contract, he does so without any real choice, so it is unlikely that consent was actually given.²³⁷ The "meaningful choice" may be interpreted as referring to procedural unconscionability, while the "unreasonably favorable" language may refer to substantive unconscionability.²³⁸

Other courts interpreting Section 2-302 have not been so quick to find contractual provisions to be unconscionable. In *Wille v. Southwestern Bell Telephone Co.*,²³⁹ a businessman contracted with a public telephone company to provide advertising in a telephone book. The telephone company, however, printed the wrong number and as a result, the businessman was forced to purchase other, more expensive advertising.²⁴⁰ The businessman sued the telephone company for the additional cost and the telephone company defended with an exculpatory clause that was printed on the back of the advertising contract.²⁴¹

²³⁴See *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 408 N.E.2d 403 (1980); *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d, 544 P.2d 20 (1975); *WHITE & SUMMERS*, *supra* note 229, at 151; *Left, Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

²³⁵ 350 F.2d 445 (D.C. Cir. 1965).

²³⁶ *Id.* at 449.

²³⁷ *Id.* The court refused to enforce a complex cross-collateralization clause in a contract to purchase appliances between the appliance dealer and a mother on welfare with seven children. *Id.* at 447-48.

²³⁸ See *WHITE & SUMMERS*, *supra* note 229, at 152.

²³⁹ 219 Kan. 755, 549 P.2d 903 (1976).

²⁴⁰ 549 P.2d at 904-05.

²⁴¹ *Id.* at 905.

The Kansas Supreme Court held that the exculpatory clause was not unconscionable. First, the court found no actual disparity in bargaining power, for the businessman could have contracted with other advertisers.²⁴² Second, the court found no unfair surprise, because the exculpatory clause was clearly printed in easily understandable language.²⁴³ Third, the court did not think that enforcement of the clause would "shock the conscience," because the clause was reasonably inserted by the telephone company to prevent damages speculative in nature.²⁴⁴

The factors enumerated in *Williams* could be applied to a provision limiting liability in a contract of air carriage. Liability limitation provisions that are printed in small type or incorporated by reference may constitute procedural unconscionability by depriving a party of a meaningful choice. In addition, if all air carriers have similar contracts, then the single passenger or shipper again has no real bargaining power. Liability limitation provisions may also be substantively unconscionable if they unreasonably limit a party's remedies for breach of contract. On the other hand, a court following the analysis in *Southwestern Bell* would probably uphold liability limitation in a contract of carriage so long as it was clearly printed and had a reasonable purpose. Such a court would probably not be concerned with the passenger's lack of bargaining power.

V. CONCLUSION

In abolishing the tariff system, Congress apparently did not consider the specific effect that deregulation would have on the ability of air carriers to limit their liability contractually. Congress did intend for market forces to efficiently regulate rates and practices.²⁴⁵ While rates and some carrier practices will be influenced by market forces, the same will not hold true for liability limitations. Such limitations are rarely even

²⁴² *Id.* at 910.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *supra* notes 79-80 and accompanying text.

noticed by passengers and shippers, much less used as a basis for choosing a carrier.

The greatest potential problem with the deregulation of liability limitations will be the resulting lack of predictability. Whatever problems existed with regulation by the Board, the courts' deferral to the Board's determination of the reasonableness or unreasonableness of liability limitations led to uniformity of interpretation. From the air carriers' point of view, the existence of a predictable rule is as important as the substance of any particular rule. In the absence of federal legislation, air carriers in interstate commerce will be forced to comply with divergent state standards when various state rules are no longer preempted by the Board's authority.²⁴⁶ The air carriers will need to make some greater effort to inform passengers and shippers of terms and conditions of carriage than by the current practice of incorporating a tariff by reference, but different courts will enforce differing standards of readability and notice. If all of an air carrier's provisions relating to baggage, rerouting and delays must be supplied to each passenger and shipper, then the ticketing, boarding and shipping processes will become much more complicated and expensive.

From the consumer's point of view, passengers and shippers will need some protection from the possibility of some air carriers instituting unacceptable risk shifting practices. Without the Board's policing supervision, very short notice and commencement of suit limitations could be upheld for the first time in many years.²⁴⁷ Moreover, when current regulations concerning minimum released rule clauses limiting an air carrier's liability for property damage are no longer in effect, some air carriers could attempt to severely limit their losses.

²⁴⁶ The Airline Deregulation Act does include a preemptive provision prohibiting states from affecting the "law relating to rates, routes, or services" of any interstate carrier. 49 U.S.C. § 1305 (Supp. IV 1980). The legislative history of the Act, however, does not indicate that Congress intended to include liability limitations as "rates." REPORT, *supra* note 72, at 98-100. Cf. *Hughes Air Corp. v. Public Utilities Comm. of Cal.*, 644 F.2d 1334 (9th Cir. 1981) (prohibiting a state agency from regulating the rates, routes and services of a commuter carrier exempted from regulation by the Board).

²⁴⁷ See *supra* notes 161-86 and accompanying text.

So long as these limitations on liability are conspicuously included in contracts of carriage, they could be enforced in court.²⁴⁸

One possible solution to these problems would be for Congress to reverse its decision to abolish the Board. This seems unlikely, for most members of Congress are apparently satisfied with deregulation and its effects.²⁴⁹ A second possibility would be to legislate specifically against some potential abuses. Other common carriers are governed by statutes imposing minimum notice and commencement of suit limitations²⁵⁰ and Congress could similarly provide for air carriers in this manner. However, statutory regulation of readability and noticability of conditions of carriage, as well as statutory regulation in changing carrier practices, would be impracticable.

An overall solution would be to transfer some policing authority to another federal agency. The Board currently prohibits "unfair or deceptive practices" under section 411 of the Act.²⁵¹ This function of the Board is not among those to be transferred to other federal agencies upon the Board's sunset.²⁵² This function could easily be transferred to either the Department of Transportation or the Federal Trade Commission.²⁵³ The Federal Trade Commission has the advantage of already having a similar provision in its enabling act²⁵⁴ and currently regulates the deceptive practices of some other common carriers.²⁵⁵

Transfer of such authority to another federal agency would be a reinstitution of the Board's previous broad powers in another agency. The regulation of deceptive practices is much narrower than the Board's previous authority to regulate

²⁴⁸ See *supra* notes 214-17 and accompanying text.

²⁴⁹ See *Airline Woes Not Linked to Deregulation*, 40 CONG. Q. 1260 (1982).

²⁵⁰ See *supra* note 186.

²⁵¹ 49 U.S.C. § 1381 (1976). Under this section the Board regulated air carrier practices such as oversales. 14 C.F.R. § 250 (1982).

²⁵² See *supra* notes 66-68 and accompanying text.

²⁵³ See generally McInnis, *Introduction to Legislative Issues Relating to Transfer or Elimination of CAB Functions After CAB Sunset*, in *DEREGULATION OF THE TRANSPORTATION INDUSTRY* 303 (1981).

²⁵⁴ 15 U.S.C. § 45 (1976 & Supp. IV 1980).

²⁵⁵ *Id.*

“rates and practices.” Under this limited authority, a successor agency could promulgate acceptable rules concerning the noticability and readability of contract of carriage terms, as well as other limitations on liability.

